INDEX

Page

Interest of Amicus Curiae 1

Summary of Argument 2

Argument:

THE ENACTMENT OF SECTION 4(e) IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE FOURTEENTH AMENDMENT AND OTHER PROVISIONS OF THE CONSTITUTION 3

A. Congress Enacted Section 4(e) in Implementation of Its Historical Policies Toward Puerto Rico 3

1. The nature of the United States-Puerto Rico relationship 4

2. Congress endowed the Puerto Ricans with full American citizenship 8

3. Congress encouraged the continued dominance of the Spanish language in Puerto Rico 11

B. The Purpose of Section 4(e) 13

C. The Fourteenth Amendment Authorizes the Legislation 15

D. Congress Enacted Section 4(e) in Implementation of Policies in an Area of Its Special Competence 17

Conclusion 19

CITATIONS

Cases:

American & Ocean Insurance Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828) 5

Balzac v. Porto Rico, 258 U.S. 298 (1922) 9

Carrington v. Rash, 380 U.S. 89 (1965) 15

Downes v. Bidwell, 182 U.S. 244 (1901) 4, 5, 6

Page

Drueding v. Devlin, 380 U.S. 125 (1965), *affirming* 234 F. Supp. 721 (D. Md. 1964) 15
Ex parte Virginia, 100 U.S. 339 (1880) 16, 17
Ex parte Yarbrough, 110 U.S. 651 (1884) 11
Gibson v. Mississippi, 162 U.S. 565 (1896) 17
Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 17
Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) 16
Missouri v. Holland, 252 U.S. 416 (1920) 18
Nixon v. Herndon, 273 U.S. 536 (1927) 15
RCA Communications, Inc. v. Government of the Capital, —— P.R. —— (Sup. Ct. of P.R., Nov. 17, 1964) 5
Reynolds v. Sims, 377 U.S. 533 (1964) 11, 15
South Carolina v. Katzenbach, 34 U.S. L. Wk. 4207 (U.S. March 7, 1966) 17
Strauder v. West Virginia, 100 U.S. 303 (1880) 17
Truax v. Raich, 239 U.S. 33 (1915) 19
United States v. County Bd. of Elections, 248 F. Supp. 316 (W.D.N.Y. 1965) 10, 17
United States v. Gainey, 380 U.S. 63 (1965) 17

FEDERAL CONSTITUTIONAL PROVISIONS:

U.S. Const. art. IV, § 3 .....4, 7, 18

U.S. Const. art. VI 4, 18

U.S. Const. amend. XIV 2, 3, 11, 15, 16, 17, 18, 19

FEDERAL TREATIES AND STATUTES:

Voting Rights Act of 1965, § 4(e), 79 stat. 439 (1965) 2, 3, 5, 7, 10, 13, 15, 17, 19

79 stat. 27 (1965), 20 U.S.C.A. §§ 236 *et seq.* (Supp. 1965) 13

National Defense Education Act, 72 stat. 1581 (1958), as amended, 20 U.S.C. §§ 401 *et seq.* (1964) 13

66 stat. 327 (1952) 6

66 stat. 236 (1952), 8 U.S.C. § 1402 (1964) 8

Federal Relations Act, 64 Stat. 319 (1950), 48 U.S.C. §§ 731b-31c (1964) 6, 7

Page

Act of Aug. 5, 1947, ch. 490, 61 stat. 770 (1947) 6, 12

Organic Act of 1917, ch. 145, 39 stat. 951 (1917) 6, 8, 9

Act of June 16, 1906, ch. 3335, § 3 Fifth, 34 stat. 271 (1906) 12

Act of April 12, 1900, ch. 191, 31 Stat. 77 (1900) 6, 8

Treaty of Paris, 30 stat. 1754 (1898) 4, 5, 8, 18

Act of Feb. 20, 1811. 2 Stat. 641 (1811) 12

MISCELLANEOUS

Commonwealth of P.R., Budget for Fiscal Year 1967, § 21, p. 1 14

Memorandum by the Gov't of the U. S., U.N. Gen. Ass. Off. Rec. 8th Sess., Com. on Infor. from Non-Self-Governing Territories Annex II, at 1 (A/AC.-35/L. 121) (1953) 7

N.Y. Const. art. II, § 1 3

N.Y. Election Law §§ 150, 162, 168, as amended, N.Y. Election Law § 168 (McKinney Supp. 1965) 3

Osuna, A History of Education in Puerto Rico (1949) 12

Proclamation by the Governor of Puerto Rico, July 25, 1952 6

P.R. Const. 6

U.N. Gen. Ass. Res. No. 151 (8th Sess. 1953) 7

U. S. Delegation to U.N. Gen. Ass. Press Release, No. 1802 (Nov. 3, 1953) 8

U. S. Delegation to U.N. Gen. Ass. Press Release, No. 1740 (Aug. 28, 1953) 10

U. S. Dep't of Commerce, Bureau of the Census (1960) 14

111 Cong. Rec. (daily ed. July 9, 1965) 13, 14

111 Cong. Rec. (daily ed. July 6, 1965) 13, 14

111 Cong. Rec. (daily ed. May 20, 1965) 10, 14

111 Cong. Rec. (daily ed. May 19, 1965) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 847

NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., *Appellants*

v.

JOHN P. MORGAN and CHRISTINE MORGAN

No. 877

NEW YORK CITY BOARD OF ELECTIONS, ETC., *Appellant*

v.

JOHN P. MORGAN and CHRISTINE MORGAN

Appeals From the United States District Court for the District of Columbia

---

Brief of Commonwealth of Puerto Rico as Amicus Curiae in Support of Appellants

---

INTEREST OF AMICUS CURIAE

This case concerns the validity of federal legislation that enables Puerto Ricans in New York to substitute completion of a sixth grade education in an accredited Spanish language school in Puerto Rico for the New

York State English literacy test in determining voting eligibility. The Commonwealth of Puerto Rico is deeply interested in the outcome of the case. It has long been concerned with the well-being and progress of the thousands of Puerto Ricans who, as citizens of the United States, under the spirit of the United States-Puerto Rico association and inspired largely by the hope for a better job, have moved from Puerto Rico to the mainland of the United States. The Commonwealth Government neither encourages nor discourages migration. It has, however, long maintained a program of instruction for those on the island who are contemplating the move to the states, has established Puerto Rico Department of Labor offices in major cities to assist both migrants and their new hosts in the adjustment process and, through its Labor Department Migration Division, carries on extensive programs in mainland cities to urge Puerto Rican migrants to go to night school, improve skills and learn English—all in order that they may play a more constructive and creative role in the new communities they have chosen to join. Furthermore, it is important to the Commonwealth that the legal aspects of the present relationship between the United States and Puerto Rico which may be considered in connection with this case be carefully set forth in this Court.

For these reasons the Commonwealth of Puerto Rico has decided to file this brief as an amicus curiae.

SUMMARY OF ARGUMENT

Section 4(e) of the Voting Rights Act of 1965[1] is a valid exercise of Congressional power under the Fourteenth Amendment. The purpose of the legisla-

[1] 79 Stat. 439 (1965).

tion is to override the conflicting portions of the Constitution of New York and of the New York election law[2] which deprive of their right to vote a class of literate and native born United States citizens educated in American-flag schools. This purpose is clearly within the scope of the Fourteenth Amendment. Congress has chosen an appropriate means to achieve this purpose. That means is the substitution of educational proof for the New York English literacy test. Section 4(e) is appropriate legislation under the Fourteenth Amendment for these reasons and also in view of the historic policies adopted by Congress in its close and creative relationship with Puerto Rico.

ARGUMENT

THE ENACTMENT OF SECTION 4(e) IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE FOURTEENTH AMENDMENT AND OTHER PROVISIONS OF THE CONSTITUTION

A. Congress Enacted Section 4(e) in Implementation of Its Historical Policies Toward Puerto Rico

The Congressional judgment in enacting Section 4 (e) is in any case entitled to great weight and respect. The history of the close and special relationship between the United States and Puerto Rico and the role of Congress in the evolution of that relationship lend additional powerful support to the constitutionality of the legislation. We shall accordingly discuss first, in Section A, the special considerations arising from this relationship and will then discuss, in Sections B and C below, certain further factors which support the validity of the legislation.

---

[2] N.Y. Const. art. II, § 1; N.Y. Election Law §§ 150, 162, 168, as amended, N.Y. Election Law § 168 (McKinney Supp. 1965).

1. The nature of the United States-Puerto Rico relationship

American political genius has built up over the course of the years a unique and mutually advantageous association between the United States and Puerto Rico. By virtue of this association there is now included within the American community an island entity of two and one-half million people with a distinct culture, tradition and language.

In 1898, through the Treaty of Paris, Spain ceded Puerto Rico to the United States.[3] The Treaty specifically provided for Congressional regulation: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[4] Treaties are, of course, the "supreme Law of the Land."[5]

There are other sources which can be cited to support Congressional power over the Puerto Rico of 1898—the territorial clause of the Constitution,[6] and the in-

---

[3] 30 Stat. 1754 (1898).

[4] 30 Stat. 1759 (1898).

[5] ". . . ; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const. art. VI.

[6] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .." U. S. Const. art. IV, § 3. However, since Puerto Rico was not an "incorporated" territory, this clause is not as logical a source of power as the Treaty of Paris. See *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

herent authority of United States national sovereignty and the power of foreign relations:

> "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed 'an act for the establishment of a territorial government in Florida'. . . ."[7]

The policies here relevant to the enactment of Section 4(e) were adopted by Congress before the Commonwealth of Puerto Rico was established in 1952, that is, while Puerto Rico was a territory subject to unilateral Congressional action under its plenary powers.

---

[7] *American & Ocean Insurance Co.* v. *356 Bales of Cotton,* 26 U.S. (1 Pet.) 511, 542-543 (1828).

The Supreme Court in 1901 examined the Treaty of Paris closely in the course of determining that it did not intend to incorporate Puerto Rico into the United States. The Court stated at one point:

> "We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire'." *Downes* v. *Bidwell,* 182 U.S. 244, 279 (1901).

A recent decision of the Supreme Court of Puerto Rico characterizes the authority of Congress over the territory of Puerto Rico as stemming both from the Treaty of Paris and from the territorial clause. *RCA Communications, Inc.* v. *Government of the Capital,* —— P.R. —— (Sup. Ct. of P.R., Nov. 17, 1964).

From the beginning the United States has recognized the economic and cultural distinctiveness of Puerto Rico, and has adapted its policies accordingly. This has been feasible under the Constitution, since Puerto Rico was not incorporated into the United States like the states and most of the territories.[8] Thus, for example, Puerto Rico has always had a separate fiscal system: the United States internal revenue laws have never applied to Puerto Rico,[9] and customs receipts on imports into Puerto Rico are paid into the Puerto Rican treasury.[10] And Congress through the years delegated increasing control to Puerto Rico of its local government.[11]

In 1952 Puerto Rico achieved a full measure of local self-government through a compact mutually approved by the United States Congress and the people of Puerto Rico.[12]

The Federal Relations Act[13] continues as a matter of bilateral agreement the historic Congressional policies relevant to this case of common American

---

[8] *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

[9] Act of April 12, 1900, ch. 191, §§ 3, 4, 31 Stat. 77 (1900); Organic Act of 1917, ch. 145, § 9, 39 Stat. 954 (1917); Puerto Rican Federal Relations Act, 64 Stat. 319 (1950), 48 U.S.C. §§ 731b-31e (1964).

[10] 31 Stat. 78 (1900), 48 U.S.C. § 740 (1964).

[11] Organic Act of 1917, ch. 145, 39 Stat. 951 (1917); Act of Aug. 5, 1947, ch. 490, 61 Stat. 770 (1947).

[12] 64 Stat. 319 (1950), 48 U.S.C. §§ 731b-31e (1964); P.R. Const.; 66 Stat. 327 (1952); Proclamation by the Governor of Puerto Rico, July 25, 1952.

[13] 64 Stat. 319 (1950), 48 U.S.C. §§ 731b-31e (1964). This act sets forth the basic terms of the association between the United States and Puerto Rico.

citizenship and cultural distinctiveness. Judge McGowan's dissenting opinion below is not correct to the extent that it assumes or implies that Congress retains plenary power over Puerto Rico, under the territorial clause or any other source. The establishment of the Commonwealth in 1952 inaugurated a bilateral relationship between the United States and Puerto Rico, the terms of which, set forth in the Federal Relations Act, can be altered only by mutual consent, and not by unilateral action of Congress. The Congressional enactment of Section 4(e) is supported by historic Congressional policies adopted when Puerto Rico was a territory and continued by mutual consent at the time the Commonwealth was established; the enactment did not and could not rest on the thesis of continuing Congressional plenary power over Puerto Rico.[14] This is not to say that there

[14] The change in Puerto Rican status is illustrated by United Nations action removing Puerto Rico from the rolls of the non-self-governing territories. In 1953 the United Nations, upon the initiative of the United States, adopted a resolution recognizing that, with the establishment of the Commonwealth, Puerto Rico ceased to be a colony or territory subject to the unilateral and plenary authority of the United States. The United Nations noted that Puerto Rico has "achieved a new constitutional status", that the new association between the United States and Puerto Rico "constitutes a mutually agreed association" and that the Puerto Ricans "have attained internal self-government". U.N. Gen. Ass. Res. No. 151 (8th Sess. 1953).

The United States Government detailed in various documents and statements that Puerto Rico had achieved "the full measure of self-government." Memorandum by the Gov't of the U. S., U.N. Gen. Ass. Off. Rec. 8th Sess., Com. on Infor. from Non-Self-Governing Territories, Annex II, at 1 (A/AC.35/L.121) (1953). For example, at one point United States Representative

are no residual territorial and treaty powers in Congress to implement these historic policies, at least insofar as Puerto Ricans resident in the states are concerned.

2. Congress endowed the Puerto Ricans with full American citizenship

It is of first importance in this case that, in accordance with its responsibility for "the civil rights and political status of the native inhabitants" as set out in the Treaty of Paris, Congress endowed the people of Puerto Rico with full American citizenship. In the first Organic Act of 1900, Congress recognized the people of Puerto Rico as a "body politic" and declared that residents (except those electing by a certain date to retain their Spanish citizenship) were citizens of Puerto Rico and entitled to the protection of the United States.[15] In the second Organic Act in 1917, Congress conferred United States citizenship upon the people of Puerto Rico.[16] Since that date all persons born in Puerto Rico and subject to the jurisdiction of the United States are native born American citizens with all the rights and obligations flowing therefrom.[17] This was a novel and dramatic enactment of Congress.

Frances P. Bolton stated: "The present status of Puerto Rico is that of a people with a constitution of their own adoption stemming from their own authority which only they can alter or amend. The relationships previously established also by a law of the Congress, which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent." U. S. Delegation to U.N. Gen. Ass. Press Release, No. 1802 (Nov. 3, 1953).

[15] Act of April 12, 1900, ch. 191, § 7, 31 Stat. 79 (1900).

[16] Organic Act of 1917, ch. 145, § 5, 39 Stat. 953 (1917).

[17] 66 Stat. 236 (1952), 8 U.S.C. § 1402 (1964).

In one move, more than a million people outside the continental United States were given United States citizenship.

The importance of this citizenship cannot be overstated. The closeness of the United States-Puerto Rico relationship has been in no small part a result of that status, and the Puerto Ricans are deeply committed to their citizenship. Citizenship carries with it many duties and privileges, not all of which can be precisely delineated. One of the most important of the rights of citizenship is the right to move freely into and about the United States mainland. An earlier case in this Court described this:

> "It became a yearning of the Porto Ricans to be American citizens, therefore, and this act [Jones Act] gave them the boon. What additional rights did it give them? It enabled them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political. A citizen of the Philippines must be naturalized before he can settle and vote in this country. . . . Not so the Porto Rican under the Organic Act of 1917."[18]

The Court used the words "civil, social and political" to characterize the rights of the Puerto Rican migrating to the United States mainland. The language points up the direct connection between the citizenship of a Puerto Rican and his consequent right to move onto the mainland and there participate in the life of his new residence on an equal footing with other resi-

---

[18] *Balzac* v. *Porto Rico*, 258 U.S. 298, 308 (1922).

dents.[19] This right to "political integration" of Puerto Ricans residing in the United States was also on Congress' mind when it was considering Section 4(e). For example, Senator Javits referred to the importance of the Puerto Ricans in New York becoming a part of the community through political participation and voting.[20] Judge Kaufman in a pending case similar to the present one mentioned Congress' concern "for the Puerto Rican-American's problem in integrating his community into the political lifestream of the nation, and, in particular, the political life of New York State."[21] It is, therefore, an important concomitant of the Puerto Rican's right to move freely onto the mainland that he should be able there to participate in the political process and to vote.

There is another direct link between citizenship and voting. The Constitution is now generally interpreted to include the crucial right to choose one's rulers. As

---

[19] The United States described this to the United Nations when it was considering Puerto Rican status in 1953:

> "Similarly, it should be pointed out that the people of Puerto Rico who are today citizens of the Commonwealth continue to be citizens of the United States of America, with free access to the entire country and with the right to complete freedom of movement therein. The importance of this provision can be judged by the number of Puerto Ricans now residing in the United States. These Puerto Ricans, as well as all those who will reside there in the future, become automatically incorporated into the political life of the country and have the right to vote in state and national elections simply by virtue of their residence and as prerogative of their citizenship." U. S. Delegation to the U.N. Gen. Ass. Press Release, No. 1740 (Aug. 28, 1953).

[20] 111 Cong. Rec. 10681 (daily ed. May 20, 1965).

[21] *United States* v. *County Bd. of Elections*, 248 F. Supp. 316, 320 (W.D.N.Y. 1965).

early as the 1880's national citizenship was declared by this Court to carry with it the right to vote for national officers.[22] The reapportionment cases have been the occasion of some vigorous re-analysis of the right to vote, and they affirm it as a Constitutionally protected right which belongs to every citizen of the United States:

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[23]

The rational basis for the Congress' concern to ensure the voting rights of Puerto Ricans who have taken up residence on the mainland is thus fortified by the judicial recognition of voting protections inherent in the Constitution and particularly the Fourteenth Amendment. In undertaking to grant full citizenship to the Puerto Rican people almost fifty years ago, Congress embarked on a policy which, as reaffirmed in the compact of 1952, both authorizes and obligates Congress to ensure that whatever constitutional rights flow from that citizenship are not infringed.

3. Congress encouraged the continued dominance of the Spanish language in Puerto Rico

The language difference at the heart of this case is a vivid example of the imaginative and enlightened approach which Congress has taken toward the people of Puerto Rico. The United States has encouraged di-

---

[22] *Ex parte Yarbrough*, 110 U.S. 651 (1884).

[23] *Reynolds* v. *Sims*, 377 U.S. 533, 554-55 (1964).

versity in many ways, and has enjoyed the richness and strength that can come therefrom. In the case of the Puerto Ricans, Congress has included within the ranks of its full citizens an island of people differing in many ways from the United States, and has encouraged the continuation of their own culture: a cosmopolitan citizenship. The domination of the Spanish language in Puerto Rico has been one result.

After the failure of early attempts to make English the language of instruction in the school system in Puerto Rico, Congress has never exerted its powers to substitute English as the common language in Puerto Rico, in contrast to American experience in other areas under its jurisdiction.[24] The imposition of English in the school system had a downhill history, in the face of the strong Spanish tradition. From 1903 to 1916 English was the language used in the schools, under policies adopted by the Presidentially-appointed Commissioner of Education. From 1916 to 1949 Spanish was increasingly used. Since 1949 Spanish has been the language of instruction in all grades through high school.[25] From 1949 to 1952 the Commissioner of Education was locally chosen under authorizing legislation of Congress.[26] In 1952 the establishment of the Commonwealth put educational matters, as an internal affair, entirely into the hands of the Commonwealth government.[27] At no time in authorizing educational

---

[24] See, *e.g.*, Act of June 16, 1906, ch. 3335, § 3 Fifth, 34 Stat. 271 (1906) (Oklahoma Enabling Act); Act of Feb. 20, 1811, 2 Stat. 641 (1811) (Louisiana Enabling Act).

[25] Osuna, A History of Education in Puerto Rico, 342-414 (1949).

[26] Act of Aug. 5, 1947, ch. 490, § 3, 61 Stat. 771 (1947).

[27] See authorities cited note 12 *supra*.

grants to Puerto Rico has Congress attempted to tie them into the use of English.[28]

That Spanish has continued to be the dominant language of the Puerto Ricans, and even the public schools have entirely reverted to using it, is thus the direct result of these policies of the Congress. Congress could at any time before 1952 have compelled use or knowledge of English. The continued use of Spanish in Puerto Rico, coupled with the Congressional policy of full American citizenship and with the recent migration of Puerto Ricans to New York, has produced the constitutional distortion of a large group of American citizens barred from voting in the place they have chosen as a residence.

B. The Purpose of Section 4(e)

The purpose of Congress and the considerations which guided it in the enactment of Section 4(e) are unusually clear. The provision originated as an amendment to the Federal Voting Rights Act of 1965. The amendment was proposed by the senators and two of the congressmen from New York[29] with emphasis on three things: (1) Many United States citizens from Puerto Rico were being deprived by the New York English literacy test of the opportunity to vote; (2) the amendment was aimed expressly at the thousands of United States citizens educated in Puerto Rican

---

[28] See, *e.g.*, National Defense Education Act, 72 Stat. 1581 (1958), as amended, 20 U.S.C. §§ 401 *et seq.* (1964); 79 Stat. 27 (1965), 20 U.S.C.A. §§ 236 *et seq.* (Supp. 1965).

The English language, it should be noted, has for many years been taught in the Puerto Rican schools and in many areas is spoken concurrently with Spanish, particularly where the federal interchange is important. But the common mother tongue has remained Spanish.

[29] Senators Javits and Kennedy, 111 Cong. Rec. 10643 (daily ed. May 19, 1965); Representatives Ryan and Gilbert, *id.* at 15101, 15665 (daily ed. July 6, 9, 1965).

schools who were disqualified from voting in mainland elections because they were literate in Spanish rather than in English; and (3) it was Congressional policy that the primary language of the Puerto Ricans had continued to be Spanish and not English. The proponents also emphasized the high educational standards of the Puerto Rican schools (the literacy rate in Puerto Rico is 83%,[30] and the Commonwealth is now devoting over one-third of its annual budget to education),[31] and the availability of New York of Spanish language newspapers, radio and other informational media.[32] Congress was careful to write a remedial

---

[30] U.S. Dept. of Commerce, Bureau of the Census (1960), R. 75.

[31] Commonwealth of P.R., Budget for Fiscal Year 1967, § 21, p. 1.

[32] 111 Cong. Rec. 10675-10689 (daily ed. May 20, 1965); 111 Cong. Rec. 15101-15102, 15665-15668 (daily ed. July 6, 9, 1965). "Let me describe the case of the typical New Yorker of Puerto Rican origin. By virtue of the accident of his birth he is educated in Puerto Rico in schools conducted mainly in Spanish. In school he reads, in Spanish, the same textbooks which his fellow citizen on the mainland reads in English. That his schooling takes place in Spanish is not up to him, but is due to the fact that the U.S. Government has chosen to encourage the cultural autonomy of the Commonwealth of Puerto Rico, to make Puerto Rico a showcase for all of Latin America. His education completed, he decides to exercise his constitutional right to move to another part of the United States, to the State of New York.

"New York says to him: 'It does not matter to us that you are a natural-born citizen of the United States. It does not matter that you are literate in Spanish, that you have been educated in civics and government in your school in Puerto Rico. It does not matter that you read a Spanish-language newspaper in New York which carries most of the major syndicated American political columnists, that you listen to Spanish-language programs of news and information on the radio and television. You cannot vote in our State unless you speak English, and we will not allow you to show your education as evidence of literacy even though we do allow your English-speaking brother to show his education in place of taking the literacy test.'" Senator Kennedy, 111 Cong. Rec. 10675 (daily ed. May 20, 1965).

provision that overrides only part of the New York voting qualifications and leaves a basic literacy requirement operating as a state criterion for voting eligibility; only those non-English speaking residents who have completed a sixth grade level of education are enfranchised by the federal statute.[33]

C. The Fourteenth Amendment Authorizes the Legislation

One of the vital functions of the Fourteenth Amendment is its protection against discriminatory voting practices. Of course, the states may establish the qualifications of the voters in the elections held within their boundaries; it is also agreed by all that the Fourteenth Amendment limits that right to the establishment of fair and reasonable criteria.[34] States may not arbitrarily deprive their residents of the vital right to political choice, and the courts have invalidated state discriminations against groups of potential voters. The recent example of this is the decision of this Court in *Carrington* v. *Rash*, 380 U.S. 89 (1965), holding that a state's denial of the vote to resident members of the armed services was incompatible with the equal protection clause of the Fourteenth Amendment. The Court emphasized: "We deal here with matters close to the core of our constitutional system."[35] Similar cases include the exclusion of Negroes from primaries (*Nixon* v. *Herndon*, 273 U.S. 536 (1927)), and unfair districting (*Reynolds* v. *Sims*, 377 U.S. 533 (1964)).

---

[33] Section 4(e)(2), 79 Stat. 439 (1965). Congress also carefully left authority for the states to condition the right to vote on a higher level of education by providing in that section that where state law uses a different level of education as a presumption of literacy, that level shall be the criterion for the American-flag school test.

[34] *E.g.*, *Drueding* v. *Devlin*, 380 U.S. 125 (1965), *affirming* 234 F. Supp. 721 (D. Md. 1964).

[35] 380 U.S. at 96.

The New York language test is thus very likely in conflict with the Fourteenth Amendment in itself. But the legislation in the present case stands on an even clearer footing, since specific Congressional judgment has intervened as provided in Section 5 of the Fourteenth Amendment. Congress has evaluated the situation and deliberately articulated the judgment that the state laws are in conflict with the amendment. The case is all the more impressive since Congress left to the state its literacy criterion, carefully nullifying only the sections of the laws which barred from voting all non-English speaking Puerto Ricans, even if educated and literate in Spanish.[36]

The scope of the "appropriate legislation" clause of the Fourteenth Amendment is something less than clear, but there is no doubt that it does add a measure of legislative authority. Congressional judgment expressly based on that clause is to be respected, and this is particularly true when Congress, as we described above, is acting within provinces peculiarly under its authority. As this Court stated in *Ex parte Virginia*, "... the power of Congress ... has been enlarged .... Some legislation is contemplated to make the Amendments fully effective."[37] The Fourteenth Amendment

---

[36] This point is particularly relevant in view of *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959), which held that a state literacy test does not per se violate the Fourteenth Amendment. That decision does not, of course, constitute a basis for the conclusion that (1) such tests in some circumstances may not be arbitrary in their effect, and hence invalid, or (2) that Congress, acting under the legislative implementation provision of the Fourteenth Amendment, may not provide a substitute literacy test in circumstances where Congress found literacy tests having a widespread and arbitrary effect.

[37] 100 U.S. 339, 345 (1880).

guidelines are broad and the courts have upheld the power of Congress to protect and define them carefully and creatively.[38] When, as here, Congress is trying to secure a fundamental constitutional protection, it necessarily moves with some latitude of judgment.[39] Judge Kaufman enunciated this in the sister case of *United States* v. *County Bd. of Elections:*

> "Inherent in its power to enforce the Fourteenth Amendment, Congress must be considered as having some latitude to determine for itself what patterns of activity contravene Fourteenth Amendment rights. Whether any particular form of state action is prohibited by the Amendment depends upon an assessment of many factors . . . . At the very least, in a case such as presented to us, where Congress has adopted and fostered policies which would be frustrated by conflicting state action, Congress has responsibility for exercising judgment as to when the Fourteenth Amendment is violated and the power, in appropriate cases, to eliminate the violation."[40]

D. Congress Enacted Section 4(e) in Implementation of Policies in an Area of Its Special Competence

Because Congress was here enacting legislation in an area of special Congressional responsibility and historical policies as described in Section A, *supra,* its judgment against conflicting state laws is entitled to

---

[38] *E.g., Gibson* v. *Mississippi,* 162 U.S. 565 (1896) (dictum); *Strauder* v. *West Virginia,* 100 U.S. 303, 311 (1880).

[39] See *Ex parte Virginia,* 100 U.S. 339, 346 (1880); *cf. United States* v. *Gainey,* 380 U.S. 63, 67 (1965); *South Carolina* v. *Katzenbach,* 34 U.S. L. Wk. 4207 (U.S. March 7, 1966).

[40] 248 F. Supp. 316, 322 (W.D.N.Y. 1965). Moreover, the Supreme Court has on occasion substituted a Congressional constitutional judgment for its own previously conflicting one. *Glidden Co.* v. *Zdanok,* 370 U.S. 530 (1962).

even more than the usual wide measure of respect and presumption of constitutionality. By virtue of its powers under the Treaty of Paris, Congress over the course of half a century has evolved a highly successful and creative relationship with Puerto Rico, perpetuated in 1952 in the bilateral compact establishing the Commonwealth. An important part and strength of that relationship has been the encouragement of the Puerto Rican culture and language within a framework of full American citizenship. Congress has now determined that state literacy voting tests which bar literate Puerto Rican citizens conflict with the constitutional rights of those Puerto Ricans. The nature and extent of Congressional power over Puerto Rico has changed since 1952, but the Congressional policies established up to that time, and embodied in the compact, lend a particular sanction and support to Congressional efforts to implement Fourteenth Amendment rights here. This is especially true because those rights flow from the grant of United States citizenship which is basic to the United States-Puerto Rico association; and these are rights which follow the Puerto Rican even as he moves outside the Commonwealth.

Congressional enactments pursuant to express treaty obligations are the dominant law of the land and, of course, supersede conflicting state provisions.[41] Similarly, to the extent that the historic Congressional powers over Puerto Rico derived from the territorial clause and inherent powers of national sovereignty, these too are paramount. In speaking of another exclusive federal power, immigration, this Court has recognized this quality of the Fourteenth Amendment,

---

[41] See U.S. Const. art. VI, note 5 *supra; Missouri* v. *Holland*, 252 U.S. 416 (1920).

even without implementing legislation. In *Truax* v. *Raich,* 239 U.S. 33 (1915), the court invalidated a state statute discriminating against the employment of aliens. The case is of special interest here, since the federal policies set forth under the exclusive federal power, immigration, were found to carry over to protect the alien from discrimination within a particular state, just as Congressional policies established over the years give special force to the Congressional judgment here in question in Section 4(e).

CONCLUSION

In the circumstances presented in this case, Section 4(e) of the Federal Voting Rights Act of 1965 is a valid exercise of Congressional power under the Fourteenth Amendment and supersedes the conflicting portions of the laws of New York. The judgment of the District Court should be reversed.

Respectfully submitted,

RAFAEL HERNANDEZ COLON
Attorney General
Commonwealth of Puerto Rico
San Juan, Puerto Rico

March 11, 1966